IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ERINEO CANO, Plaintiff/Appellant, v. B. VOLK and M. EVANS, Defendants/Appellees.	2 CA-CV 2007-0102 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CV200501609

Honorable Boyd T. Johnson, Judge

AFFIRMED IN PART
REVERSED IN PART AND REMANDED

Erineo Cano
Florence
In Propria Persona

Terry Goddard, Arizona Attorney General
By Wanda E. Hofmann
Tucson
Attorneys for Defendants/Appellees

P E L A N D E R, Chief Judge.

¶1 Plaintiff/appellant Erineo Cano, a prison inmate, appeals from the trial court's dismissal of the civil rights complaint he filed pursuant to 42 U.S.C. § 1983. On motion of defendants/appellees Volk and Evans pursuant to Rule 12(b)(6), Ariz. R. Civ. P., the court dismissed the complaint for failure to properly exhaust administrative remedies as required by the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a) (1996). For the reasons stated below, we affirm the dismissal of the complaint against defendant Evans but reverse the dismissal as to defendant Volk and remand the case for further proceedings.

Legal Framework

¶2 "Generally, federal laws control the substantive aspects of federal claims adjudicated in state courts, including § 1983 claims."[1] *Baker v. Rolnick*, 210 Ariz. 321, ¶ 18, 110 P.3d 1284, 1288 (App. 2005). In pertinent part, the PLRA provides: "No action shall be brought with respect to prison conditions under section 1983 . . . by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). To properly exhaust any available administrative remedies, an inmate must meet all "deadlines and other critical procedural rules." *Woodford v. Ngo*, 548 U.S. 81, ___, 126 S. Ct. 2378, 2386 (2006). The exhaustion requirement in § 1997e(a) applies to § 1983 actions filed in either state or federal court. *See Baker*, 210 Ariz. 321, ¶ 17, 110 P.3d at 1288. And the exhaustion requirement applies

[1]Under 42 U.S.C. § 1983, a person may recover damages from any state employee acting under color of law or authority who deprives the plaintiff of "any rights, privileges, or immunities secured by the Constitution and laws" of the United States.

to all prisoner lawsuits, including those in which damages are sought for use of excessive force. *See Porter v. Nussle*, 534 U.S. 516, 532 (2002).

Background

¶3 When reviewing a trial court's dismissal pursuant to Rule 12(b)(6), we accept as true the allegations in the complaint. *See Mohave Disposal, Inc. v. City of Kingman*, 186 Ariz. 343, 346, 922 P.2d 308, 311 (1996). Cano is incarcerated in the Arizona Department of Corrections (ADOC). He alleged in his complaint that in December 2004 several ADOC officers used "unnecessary, excessive and unjustified force" after escorting him to his cell. Officer Tils and several other officers, including Officer Volk, allegedly harassed, taunted, and assaulted Cano. Cano also alleged that before the incident he had informed Evans of prior harassment by Tils, but Evans had failed to take any preventive measures to protect him.

¶4 ADOC's administrative procedures allow inmates to file a grievance on matters that involve, inter alia, "[p]roperty, staff, . . . and conditions of confinement." Dept. Order (DO) 802, § 802.01, 1.1.1.1.[2] Grievances about staff misconduct require a three-step process. *Id*. § 802.12. First, the prisoner must attempt to informally resolve the problem within ten days of the incident by submitting a complaint to his assigned corrections officer. *Id*. § 802.12, 1.1.1; *see also id.* § 802.08, 1.1. Second, after receiving a response from that

[2]The relevant ADOC administrative policies can be found at http://www.azcorrections.gov/policies/802.htm (last visited March 27, 2008).

officer, the inmate has ten days to submit a formal grievance to the unit grievance coordinator, who must promptly forward it to the warden, deputy warden, or administrator for review and response. *Id*. §§ 802.12, 1.1.2, 1.1.5. Third, if the inmate is not satisfied with the warden's response, he may appeal to the ADOC director "within ten calendar days of receipt of the . . . response." *Id*. § 802.12, 1.2.1. Appeal to the director is the final step of the process and exhausts the available administrative remedies. *Id*. § 802.12, 1.2.4.

¶5 Cano initially submitted an informal grievance on December 10, 2004, four days after the incident. He did not receive a written response from his assigned corrections officer. Next, he timely filed a formal grievance with the unit coordinator on December 26, 2004. The associate deputy warden (ADW) then reviewed video surveillance of the incident and denied the grievance on January 11, 2005, concluding "there was no staff misconduct." On February 4, 2005, Cano filed his final appeal to the director.

¶6 In December 2005, Cano filed this action, alleging cruel and unusual punishment in violation of the Eighth Amendment.[3] U.S. Const. amend. VIII. Although he named thirteen ADOC officers as defendants, Cano only properly served Volk and Evans.

¶7 In their answer to the complaint, Volk and Evans did not affirmatively allege failure to exhaust administrative remedies. Nonetheless, in January 2007, Cano filed an

[3]Cano's complaint also included state law tort claims, but he voluntarily dismissed them after Evans and Volk moved to dismiss based on untimely service of process and failure to file a notice of claim pursuant to A.R.S. § 12-821.01. The trial court dismissed the state claims but excused Cano's late service of process due to his incarceration. The court also denied his request for an extension of time to serve the other defendants.

"Allegation of Administrative Exhaustion," stating he had exhausted all of his available administrative remedies. In that filing, he "declare[d] under penalty of perjury" that "[o]n 1/11/05, [he] received a response from . . . [the ADW], stating that the grievance had been denied." Volk and Evans then moved to dismiss for failure to exhaust, arguing Cano's final administrative appeal was untimely because it was filed on February 4, 2005, more than ten days after the ADW's response dated January 11, 2005. In opposing the motion, Cano asserted that, although the ADW's response to his appeal was dated January 11, 2005, Cano had not actually received it until January 27, making his February 4 appeal to the director timely. Cano also filed another declaration, again under penalty of perjury, stating he had not received the ADW's response until January 27. Without addressing or resolving the factual discrepancies in Cano's filings, the trial court found he had "failed to exhaust his administrative remedies prior to filing suit" as required by § 1997e(a) and, therefore, dismissed Cano's complaint.[4]

[4]In so ruling, the trial court noted it had reviewed not only the parties' pleadings but also various, unspecified attachments, presumably including the pertinent ADOC grievance procedures, Cano's written grievances and declarations, and an affidavit of a corrections officer filed in support of defendants' motion to dismiss. Generally, a court's consideration of matters outside the pleadings converts a motion to dismiss into a motion for summary judgment. *See Dube v. Likins*, 216 Ariz. 406, n.2, 167 P.3d 93, 104 n.2 (App. 2007); *see also* Ariz. R. Civ. P. 12(b). If a motion to dismiss is based on a failure to exhaust administrative remedies, however, "the court may look beyond the pleadings and decide disputed issues of fact." *Wyatt v. Terhune*, 315 F.3d 1108, 1120 (9th Cir. 2003); *see also Baker*, 210 Ariz. 321, ¶¶ 6-9, 110 P.3d at 1285-86 (upholding dismissal of inmate's § 1983 action even though trial court considered ADOC department order and employee affidavit).

Discussion

¶8 On appeal, Cano contends the trial court erred by ruling he had failed to exhaust his administrative remedies. "We review de novo a dismissal for failure to state a claim." *Baker*, 210 Ariz. 321, ¶ 14, 110 P.3d at 1287. We will "uphold dismissal only if the plaintiff[] would not be entitled to relief under any facts susceptible of proof in the statement of the claim." *Mohave Disposal*, 186 Ariz. at 346, 922 P.2d at 311. Although Cano is not represented by counsel, he is "held to the same standards expected of a lawyer." *Kelly v. NationsBanc Mortgage Corp.*, 199 Ariz. 284, ¶ 16, 17 P.3d 790, 793 (App. 2000). "[F]ailure to exhaust is an affirmative defense under the PLRA." *Jones v. Bock*, ___ U.S. ___, 127 S. Ct. 910, 921 (2007). Therefore, Evans and Volk "have the burden of raising and proving the absence of exhaustion." *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003).

1. Defendant Volk

¶9 As he did below, Cano argues his February 4 filing of the third-level appeal to the ADOC director, if deemed untimely, was "a result of excusable neglect." Although the ADW's grievance appeal response is dated January 11, 2005, Cano claims not to have received it "until 1/27/05—sixteen days overdue and two days past the ten calendar days that [he] had to appeal the ADW's decision." As noted above, under ADOC's policy, Cano could file an appeal to the director "within ten calendar days of *receipt* of the . . . [ADW's]

response." DO 802, § 802.12, 1.2.1. (Emphasis added.) He contends that, because he actually received the response on January 27, his February 4 appeal filing was timely.

¶10 In response, Volk does not directly address Cano's assertion that he had not received the ADW's response until January 27. Instead, Volk contends that "previously recognized exceptions to the exhaustion requirement, such as futility, no longer apply." *See Booth v. Churner*, 532 U.S. 731, 741 n.6 (2001) ("[W]e will not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise."). An allegation of futility, however, rests on the position that "there is no reasonable prospect that the applicant could obtain any relief" through administrative grievance procedures. *Health Equity Res. Urbana, Inc. v. Sullivan,* 927 F.2d 963, 965 (7th Cir. 1991). Here, Cano is not arguing futility. Rather, he contends he complied with ADOC's grievance policy by filing his appeal to the director within the allotted ten days after he received the ADW's response.

¶11 Volk also points out that ADOC's "grievance policy specifically provides that the '[e]xpiration of the time limit at any level in the process shall entitle the inmate to proceed to the next review level, unless the inmate agrees in writing to an extension.'" DO 802, § 802.07, 1.2.4. Under the policy, the warden or his designee had thirty days to review and respond to the formal grievance Cano submitted on December 26, 2004. *Id*. § 802.12, 1.1.6. Therefore, the time for the warden's response would not have expired until January 26, 2005. According to Volk, "when the deadline for the deputy warden or designee

elapsed, Cano had ten days to submit his final appeal." Volk's argument is self-defeating because, applying his logic, Cano's final appeal to the director would be timely inasmuch as it was submitted on February 4 and thus within ten days of January 26.

¶12 In addition, Volk's suggested "trigger" date of January 26 is both factually incorrect and irrelevant. It is uncontested the ADW's decision was issued on January 11, well within the thirty days allowed. The only relevant question is the date on which Cano actually received the ADW's response because only then did his ten-day period for appealing to the director commence.

¶13 On that issue, although not mentioned by the parties, there is a discrepancy in the record about when Cano actually received the ADW's response. As noted earlier, Cano initially declared "under penalty of perjury" that he had received a response from the warden on January 11, 2005. That statement, filed three days before Volk and Evans moved to dismiss based on exhaustion, directly contradicts Cano's later declaration, also made "under penalty of perjury" and repeated on appeal, that he did not receive the ADW's response until January 27. The trial court did not expressly address these inconsistencies, nor does Volk do so on appeal.[5]

[5]In the corrections officer's affidavit filed below in support of defendants' motion to dismiss, the affiant stated that "Cano had until January 21, 2005 to appeal [the] ADW['s] . . . January 11, 2005, grievance denial" and that Cano's February 4 appeal was "untimely." But those statements presuppose Cano actually received the ADW's response on January 11, an issue the affiant assumed without discussion.

¶14 In his second declaration below, Cano also alleged that "[p]rison staff often, if not routinely, purposely delay the delivery of grievance and appeal responses to prevent inmates from meeting the grievance procedure filing deadlines, to trip them up." Cano supported that allegation by submitting previous grievance documents with his response to the motion below. Consequently, Cano asserts, the third stage of ADOC's administrative process was not "available" to him because "staff obstruct[ed]" his ability to file the final appeal on time. *See* 42 U.S.C. § 1997e(a) (prisoner cannot file action "until such administrative remedies as are available are exhausted").

¶15 We also note that, in his response of January 11, the ADW stated he had received Cano's formal grievance, dated December 26, almost two weeks after that date, on January 7. From that delay, one could reasonably infer that Cano did not actually receive the ADW's response on the same day it was dated, but rather, as Cano asserts, sixteen days later. And, as Cano points out, Volk provided "no proof" that Cano actually received the response on January 11. Again, the only evidence of when Cano actually received the response is contained in his own two contradictory declarations.

¶16 In view of the factual disputes and internal inconsistencies in the record, we cannot say Volk carried his burden of "proving the absence of exhaustion." *Wyatt*, 315 F.3d at 1119. If, as Cano asserts, he did not actually receive the ADW's response until January 27, Cano's appeal to the director was timely filed on February 4, and dismissal of his complaint based on failure to exhaust administrative remedies was inappropriate. In short,

"[f]urther factual development of the record is required" to resolve this issue. *Id*. at 1120 n.15; *see also Johnson v. Garraghty*, 57 F. Supp. 2d 321, 329 (E.D. Va. 1999) (summary judgment inappropriate when factual issues existed about "whether plaintiff exhausted all available administrative remedies and, if not, whether defendants prevented him from doing so such that the exhaustion requirement should be deemed satisfied").[6]

¶17 On this record, we cannot sustain the trial court's dismissal under Rule 12(b)(6) of Cano's claims against Volk based on Cano's alleged failure to exhaust available administrative remedies. Therefore, that ruling is reversed, and the case is remanded for further proceedings. We, of course, express no view on the merits of the claims against Volk, nor do we preclude the trial court on remand from conducting any further proceedings it deems appropriate to determine the facts bearing on Volk's failure-to-exhaust defense.

2. Defendant Evans

¶18 Cano also challenges the trial court's dismissal of his failure-to-protect claim against defendant Evans, asserting he sufficiently preserved the claim in the ADOC administrative process. Evans, however, contends Cano did not adequately exhaust because Cano failed to include any claim against Evans in his first- and second-stage grievances.

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[6]By analogy, we note that, in the context of determining the timeliness of the filing of an inmate's legal documents under the "prisoner mailbox rule," Arizona courts have found remand was required "when the factual record is unclear." *State v. Goracke*, 210 Ariz. 20, ¶ 11, 106 P.3d 1035, 1038 (App. 2005) (timeliness of petition for review); *see also State v. Rosario*, 195 Ariz. 264, ¶ 10, 987 P.2d 226, 228 (App. 1999) (petition for post-conviction relief); *Mayer v. State*, 184 Ariz. 242, 245, 908 P.2d 56, 59 (App. 1995) (notice of appeal).

"The level of detail necessary in a grievance to comply with the grievance procedures will vary from system to system and claim to claim, but it is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion." *Jones*, ___ U.S. at ___, 127 S. Ct. at 923. Here, ADOC's grievance policy requires an inmate to include in writing "[a] description of the grievance, . . . [a]ny informal attempts made to resolve the problem, . . . [and a]ctions which can be taken to resolve the problem." DO 802, § 802.12, 1.1.3.1 through 1.1.3.3.

¶19 Cano's informal grievance described the underlying incident but did not mention Officer Evans or suggest he had failed to protect Cano from Officer Tils or others. Similarly, Cano's second-level, formal grievance neither mentioned Evans nor asserted a failure-to-protect claim. Cano refers to his third-level appeal to the director, in which he stated: "On two sep[a]rate occasions prior to this incident, I was harassed by Til[]s and he threatened me with bodily harm. I filed two Informal Resolution Attempts requesting that steps be taken to prevent Til[]s from carrying out his threats against me." But Cano essentially acknowledges having not previously filed a formal grievance complaining of Evans's failure to protect him from harm. Therefore, the trial court did not err in finding that Cano had failed to properly exhaust administrative remedies on his claim against Evans.[7] *See Woodford*, 548 U.S. at ___, 126 S. Ct. at 2386.

[7]In the affidavit defendants filed below, the ADOC affiant stated that "no staff grievances complaining about . . . Evans" were recorded in 2004 or 2005. Cano did not dispute that fact.

Disposition

¶20 The trial court's dismissal of Cano's complaint against defendant Evans is affirmed. Its dismissal of the complaint against defendant Volk is reversed, and the case is remanded for further proceedings consistent with this decision.

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge